

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**PP Docket No. 93-253**

**TO: The Commission**

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**SUMMARY**

The primary consideration in this docket should be the development of effective competitive bidding rules for Personal Communications Services. While UTC agrees with the Commission's desire to develop a variety of auctioning rules that could be applied to any relevant radio service, UTC urges the Commission to carefully assess the application of any such auctioning rules so that noncommercial, or "private," services or users will not be disadvantaged in securing access to needed spectrum.

Competitive bidding should be applied to existing radio services only conservatively. That is, in the case of any doubt as to whether a service has been created primarily to meet the needs of commercial service providers or to meet the needs of private users, lotteries should continue to be used. If necessary, the Commission could institute further proceedings to review the eligibility and operational rules of "mixed use" services or frequency bands to determine whether additional provisions should be added that would permit auctioning among commercial applicants while retaining lotteries for use among noncommercial applicants.

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Implementation of Section )  
309(j) of the )  
Communications Act )

PP Docket No. 93-253

Competitive Bidding )

TO: The Commission

COMMENTS OF THE  
UTILITIES TELECOMMUNICATIONS COUNCIL

Pursuant to Section 1.415 of the Commission's Rules, the Utilities Telecommunications Council (UTC) hereby submits its comments on the Notice of Proposed Rule Making, FCC 93-455, released October 12, 1993, in the above-captioned matter. This proceeding has been commenced by the Commission to develop rules on the use of competitive bidding for spectrum authorizations, as authorized by new Section 309(j) of the Communications Act of 1934, as amended. UTC will focus its comments on those aspects of competitive bidding which could negatively impact the availability of spectrum for private, non-commercial, radio services.

I. Introduction

UTC is the national representative on communications matters for the nation's electric, gas, and water utilities, and natural gas pipelines. Approximately 2,000 utility and pipeline companies are members of UTC, ranging in size from large investor owned electric-gas-water utilities serving millions of customers, to small rural electric cooperatives and water districts serving a few thousand customers each. UTC is also the FCC's certified frequency coordinator for the Power Radio Service under Part 90 of the FCC's Rules.<sup>1/</sup> All utilities and pipelines depend on the availability of secure and reliable communications facilities in carrying out their public service obligations. Virtually all utilities and pipelines operate private land mobile radio systems licensed under Part 90 of the FCC's Rules, and many operate private microwave and private Multiple Address Systems (MAS) licensed under Part 94. UTC is therefore very interested in the Commission's proposals to implement the use of competitive bidding to award new licenses in designated radio services.

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<sup>1/</sup> 47 C.F.R. §90.63.

## **II. General Approach to Implementing Legislation**

UTC agrees with the Commission's proposal to establish a variety of auctioning procedures in the rules, from which the Commission could select the most appropriate methodology as individual auctions are announced.<sup>2/</sup> As discussed below, there are a number of factors that come into play in allocating spectrum to various radio services and in assigning radio licenses to individual users. No single auction methodology could accommodate the competing interests that the Commission must balance when allocating spectrum and assigning licenses, particularly in view of the new objectives imposed on the Commission by Section 309(j)(3). Therefore, the Commission must retain flexibility to apply whatever bidding procedures will best meet those objectives under the circumstances.

## **III. Principles for Determining Whether A License Should Be Auctioned**

### **A. Initial Licenses**

UTC agrees with the Commission's determination that renewal applications and modification applications should not be subject to competitive bidding.<sup>3/</sup> Use of the term "initial license or construction permit" in Section

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<sup>2/</sup> NPRM para. 19.

<sup>3/</sup> NPRM, para. 22.

309(j)(1) indicates that applications for renewal of license or for modification of license should not be subject to competitive bidding. In addition, there is nothing in the statute or its legislative history to indicate that Congress intended to alter a licensee's "renewal expectancy," or intended to inhibit the filing of applications for modification of license in order to, for example, improve service to the public. The Commission should address, however, whether certain applications (e.g., to add new channels to an existing license) would continue to be considered "modification" applications or whether they would be considered applications for "new" licenses under the auctioning rules.

**B. "Private Services" Excluded**

Auctions should not be applied to "private" services; that is, services that do not involve "subscribers" who pay to receive communications signals or transmit communications signals directly using the licensee's frequencies.<sup>4/</sup> Even though Section 309(j) provides that auctions are to be the preferred method for selecting from among mutually-exclusive applicants, the legislative history indicates that mixed-use services should generally be considered "private" and not subject to auctioning.

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<sup>4/</sup> 47 U.S.C. §309(j)(2).



The House Report, which was incorporated by reference in the Conference Report, indicates that Congress did not intend to affect the methods used to issue licenses for "virtually all private services" and for "subcarriers and other services where the signal is indivisible from the main channel signal."<sup>5/</sup> Further, the Conference Report makes clear that Instructional Television Fixed Service (ITFS) licenses are not subject to auctioning even though ITFS licensees may lease transmission time for the delivery of video programming.<sup>6/</sup> Thus, even though a particular radio service may be used for both "private" and "commercial" services, auctioning should be applied only if it is clear that the allocation was principally intended to promote development of commercial services.

UTC also agrees that the words "private services" are not the same as "private mobile service" as defined in new Section 332 of the Communications Act. Section 332 sets out a new regulatory framework for mobile services, and raises different policy issues from those involved in Section 309(j) on competitive bidding for spectrum licenses. However, both sections recognize the importance of maintaining allocations for private, non-commercial

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<sup>5/</sup> H.R. Rep. No. 103-111, 103d Cong. 1st Sess. 253 (1993).

<sup>6/</sup> H.R. Rep. No. 103-213, 103d Cong. 1st Sess. at 481-82 (1993).

radio services and in ensuring that licensees in such "private" services are not saddled with financial or regulatory requirements.

The distinction drawn in both Section 309(j) and Section 332 between "commercial" or "subscriber" services and "noncommercial" or "private services" highlights the need for the Commission to make discrete frequency allocations for "commercial" and "private" services. At present, many frequency bands are shared between common carriers and private users,<sup>7/</sup> or between private carriers and traditional "private" radio users,<sup>8/</sup> or even between federal government agencies and commercial or private users.<sup>9/</sup> The Budget Act contemplates greater sharing of frequency bands between federal government users and private sector licensees.<sup>10/</sup> Such sharing will, however,

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<sup>7/</sup> E.g., 928/959 MHz multiple address channels (or "control channels"), available under Rule Parts 94 or 22; and the 4, 6, 10, 11, and 21 GHz point-to-point microwave bands, available under Rule Parts 94 or 21.

<sup>8/</sup> E.g., 800/900 MHz private land mobile channels; 220-222 MHz private land mobile channels; and all Part 94 private operational fixed microwave channels.

<sup>9/</sup> E.g., 932/941 MHz multiple address system channels and point-to-point microwave channels; and 220-222 MHz land mobile channels.

<sup>10/</sup> Under Section 6001 of the Budget Act, at least 200 MHz of federal government spectrum is to be reallocated for use by the private sector. Up to half of this amount may be allocated for shared use by federal government stations and non-federal stations.

be in name only if noncommercial and government users are required to compete with commercial users for the same radio licenses.

C. Intermediate Links

The Commission has asked whether intermediate links, such as point-to-point microwave links used to connect cell sites and a Mobile Telephone Switching Office, should be licensed through competitive bidding.<sup>11/</sup> Section 309(j)(2)(A) provides that bidding may be used if the FCC finds that --

(A) the principal use of such spectrum will involve, or is reasonably likely to involve, the licensee receiving compensation from subscribers in return for which the licensee --

(i) enables those subscribers to receive communications signals that are transmitted utilizing frequencies on which the licensee is licensed to operate; or

(2) enables those subscribers to transmit directly communications signals utilizing frequencies on which the licensee is licensed to operate. (emphasis added)

By definition, intermediate links are not used to provide service directly to subscribers; they do not enable subscribers to "receive communications signals;" nor do they enable subscribers to "transmit directly." Intermediate links are nothing more than a substitute for

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<sup>11/</sup> NPRM at paras. 28-29.

hard-wired facilities, and are not essential to the carrier's primary offering of a "subscriber" service. As such, they do not fit the definition of a subscriber service in Section 309(j)(2)(A).

These intermediate links are typically point-to-point microwave facilities licensed under Rule Part 21. As discussed below, most of the common carrier (Part 21) microwave bands are also available for licensing by private users in the Part 94 Private Operational Fixed Microwave Service, and subjecting these bands to competitive bidding could work to the disadvantage of Part 94 applicants. Further, because of the frequency coordination requirement and the narrow beamwidths employed in these systems, instances of mutual exclusivity are very rare. Thus, exemption of intermediate links from the competitive bidding process will have little, if any, impact on anticipated auction revenue.

D. Principal Use Requirement

The Commission proposes, through this rulemaking proceeding, to identify existing radio services in which the "principal use" of the spectrum "will involve, or is reasonably likely to involve the licensee receiving compensation from subscribers." The Commission has

requested comment on the criteria to be used in determining whether a service meets the "principal use" requirement.<sup>12/</sup> The Commission proposes to identify classes of licenses or permits to determine "principal use," rather than individual licenses that are candidates for competitive bidding. The Commission further proposes to apply competitive bidding to any service in which at least a majority of the use is for service to subscribers for compensation, rather than for "private service."

UTC supports the Commission's efforts to make preliminary determinations of which existing radio services would meet the statutory test for competitive bidding, but strongly urges the Commission not to make final designations until the Commission has an opportunity to review and revise, as appropriate, the basic eligibility and service rules for "mixed" services; that is, services that are available for "private service" as well as subscriber services. Premature application of competitive bidding rules to mixed use services could effectively foreclose these services from "private service" applicants, such as public safety entities, utilities, pipeline companies, and other traditional Part 90 eligibles.

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<sup>12/</sup> NPRM at paras. 30-33.

Section 309(j)(3) requires the FCC to "include safeguards to protect the public interest in the use of the spectrum" and to "promote the purposes specified in section 1 [of the Communications Act]" when identifying the classes of licenses and permits to be issued by competitive bidding and in specifying eligibility and other characteristics of such licenses and permits. Application of competitive bidding across-the-board, including frequency bands allocated for use by both commercial and private users, would conflict with this statutory mandate.

Even though the statute uses the term "principal use," thereby connoting that auctions could apply to mixed-use bands, Section 309(j) does not require the FCC to apply auctioning to all existing mixed-use bands. The radio services currently defined in the Commission's Rules were established in fulfillment of the Commission's statutory mandate to provide for the equitable distribution of radio licenses in the public interest. Eligibility and operational rules have been adopted for each radio service to ensure that all entities needing radio spectrum will have fair access. For example, certain radio and television broadcast channels have been specifically reserved for noncommercial use to ensure that non-profit entities would have an opportunity to secure spectrum without having to compete in the marketplace with the

generally better-capitalized commercial broadcasters. Similar commercial/noncommercial distinctions have been drawn in the Part 90 Private Land Mobile Radio Services, and between the Industrial Television Fixed Service (ITFS) and the Multichannel Multipoint Distribution Service (MMDS). Through the years, the Commission has recognized the very basic economic fact that entities proposing a commercial radio service are more likely to secure the funding and react quickly enough to secure radio licenses than entities wishing only to use spectrum for noncommercial or "private" use.

In more recent years, the Commission has developed rules to permit commercial and private users to share some bands. Such shared allocations were made only after careful consideration of the ability of private users to compete effectively for the available spectrum. With lotteries as the primary selection method, all parties -- commercial or private -- had an equal opportunity to secure licensing.

The authorization of competitive bidding is only intended to change the way the FCC selects from among mutually-exclusive applicants in commercial radio services, and is not meant to diminish the ability of private service applicants to secure frequency assignments. Section

309(j)(3) is very clear in directing the Commission to ensure that new and innovative services are made available "by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women." If mixed-use bands are made available only through competitive bidding, small businesses hoping to use spectrum to meet their internal communications requirements will not be able to compete with commercial providers. As a result, licenses to use the spectrum will be controlled by a relatively small concentration of commercial providers.

It will be difficult, if not impossible, for the Commission to determine "principal use" in certain mixed-use bands or services. For example, private microwave users were recently authorized to access microwave bands that were heretofore reserved for use by communications common carriers.<sup>13/</sup> If "principal use" is measured only by the current use of a band, these bands would be deemed "commercial" even though one could expect that usage will, over time, become evenly mixed between private and commercial users as private microwave systems are relocated

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<sup>13/</sup> See Second Report and Order in ET Docket No. 92-9, 8 FCC Rcd 6495 (1993).



from the 2 GHz band and as new private microwave systems, that would have been licensed in the 2 GHz band, are licensed in these former "common carrier" bands.

Conversely, if a frequency band is currently used primarily for "private" service, but becomes primarily "commercial" over time, will new licensees face the prospect of having to secure licensing through competitive bidding since the service is now "principally" a commercial service?

For all of these reasons, UTC urges the Commission to maintain the status quo use of lotteries to select among mutually-exclusive applicants in mixed use bands or services. Lotteries should remain the selection method until the Commission has an opportunity to develop discrete frequency allocations or strict eligibility and operational limitations designed to ensure that "private" applicants will still have fair access to spectrum, and that use of auctions (or exemption of mixed services) will not act as an artificial incentive for applicants to apply for essentially "private" spectrum with the intention of establishing a primarily commercial service.<sup>14/</sup>

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<sup>14/</sup> In the NPRM, the Commission noted the potential for applicants to avoid competitive bidding by disguising their offerings as "private" services. NPRM, n.15. The Commission stated its intention to "scrutinize any such  
(continued...)

UTC opposes the Commission's suggestion that it classify as commercial any service in which there is any commercial use.<sup>15/</sup> The NPRM correctly notes that public safety agencies, utilities, and other private licensees might have to bid against commercial service providers if this standard were adopted. Moreover, an exemption for "public safety" entities would not resolve this problem. The need for private spectrum is just as great among utilities and pipeline companies as among "public safety" entities. For utilities, pipelines, and other core industrial users, spectrum is not a profit-center: it is a "tool" needed to ensure the safe, efficient, and reliable delivery of goods and services to the American public.<sup>16/</sup>

In any event, Section 309(j)(2) provides that competitive bidding may be used in any service which is "principally" used for commercial service. Use of competitive bidding for bands that merely have the presence

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<sup>14/</sup> (...continued)  
developments and take steps to deal with such behavior, such as reclassifying service or service categories, if and when it occurs."

<sup>15/</sup> NPRM at para. 33.

<sup>16/</sup> The application of auctions could be particularly burdensome for regulated entities such as utilities, whose bids for spectrum might face scrutiny by state regulatory agencies. Utilities would therefore have a tendency to underbid for spectrum due to concern that any bids that are perceived as excessive by state regulatory authorities could be disallowed.

of commercial service providers would not meet any definition of the term "principally used."

#### IV. Auction Design

UTC will restrict its discussion of auction design to those issues which could affect the fair allocation of spectrum to private services or which could lead to abuses in the auctioning process.

##### A. Unjust Enrichment

UTC supports measures designed to prevent unjust enrichment of licensees. UTC urges particular care in the development of rules to ensure that the intent of the statute in promoting opportunities for the designated entities is fulfilled and not abused.

Since the intent of the statute is to promote opportunities for members of certain groups to acquire licenses and operate new communications systems, the rules should prohibit unjust enrichment on the sale of the license and associated assets by individuals or entities acquiring licenses through the benefit of any special auction provisions. For example, applicants for transfer

of control or assignment of license should be required to submit:

1. Information on all expenditures made by the licensee in acquiring the license and in furtherance of construction and operation;
2. A demonstration of compliance with any relevant construction benchmarks;
3. Full disclosure of all consideration promised or paid for the transfer;
4. Certification by all parties to the transaction that no other consideration has been promised or paid;
5. Certification by an independent auditor that the consideration does not exceed the amount invested by the licensee in acquiring the license and constructing and operating the system.

As an alternative provision, the rules could provide that no special financial showings would be required if the licensee proposes to transfer the license to another entity who would have been qualified to receive the license under the same terms and conditions as the original licensee.

UTC also supports the adoption of strict limitations on the sale of licenses acquired through lottery. Recent allocation decisions have resulted in the filing of many applications, the vast majority of which are most likely speculative in nature. To the extent lotteries are used to select among applicants in "private services" as well as mixed-use services, antitrafficking provisions should be

adopted to discourage such rampant speculation and to speed the issuance of licenses to bona fide applicants.

B. Performance Requirements

Even though an entity who acquires a commercial license through competitive bidding will have a strong incentive to construct a system and provide revenue service to the public, reasonable performance requirements would help ensure that licensees do not warehouse commercial spectrum for potentially anticompetitive purposes.

For licenses granted by lottery, including most private services, reasonable performance standards should be adopted which reflect the likely use to be made of the service. For example, a requirement to "serve" a certain percent of the population within a certain timeframe would be irrelevant and prohibitive in most private services. However, a basic construction requirement and/or mobile loading requirement might be appropriate.

C. Collusion

UTC supports the adoption of rules designed to discourage collusion in bid preparation. However, the rules should not be so rigid as to deter the formation of

joint ventures to bid on individual licenses or consortia to bid on regional or national licenses.

UTC recommends the adoption of disclosure requirements designed to reveal potentially collusive activities. Under this proposal, applicants generally would be prohibited from discussing proposed bid amounts prior to auction. To enforce this requirement, each applicant could be required to certify, at the time of auction, that it has not discussed its bid with any other applicant and that it has not received any information from any other applicant concerning that party's bid amount.

In situations where the parties propose to form or enter a joint venture or consortium for the purpose of submitting an individual or aggregate bid, each party could be required to promptly file a disclosure statement with the Commission which reveals:

1. The names of the parties;
2. The date discussions began (or will begin); and
3. The general nature of the discussions (e.g., to explore the formation of a consortium to submit an aggregate bid for licenses in two or more markets).

No party would be permitted to participate in a consortium or joint venture unless it had filed such a disclosure statement with the Commission. Disclosure provisions such

as these would allow parties to discuss the details involved in establishing a joint venture or consortium, but only with notice to other parties, the Commission, and other relevant agencies as to the potential for collusive behavior, thereby acting as a self-enforcement mechanism.<sup>17/</sup>

D. Waiver Requests

The Commission has requested comment on the filing and disposition of waiver requests in connection with applications subject to competitive bidding.<sup>18/</sup> Waiver requests could present a dilemma in the context of competitive bidding: denial of a winning applicant's waiver could necessitate another round of bidding, with all participants having the benefit of knowing the bids made in the initial round. The problem is particularly acute if the waiver was requested in connection with a winning aggregate bid.

UTC recommends that waiver requests relating to eligibility requirements should be processed prior to

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<sup>17/</sup> Similar disclosure requirements are used under the National Cooperative Research and Production Act, 15 U.S.C. 4301, to permit limited exchange of technical information among competitors with immunity from treble damages (but not actual damages) under the antitrust laws.

<sup>18/</sup> NPRM at para. 99.

auction. Waiver requests relating to technical or service rules should be reviewed only after auction.

Alternatively, an applicant should be permitted to request summary disposition of its waiver request prior to auction on the condition that if the waiver is denied, the applicant will not be permitted to amend its application and participate in the auction. This alternative procedure would enable an applicant to secure a ruling on any waiver request it deems absolutely essential to its decision on whether to bid for the spectrum.

**E. Resolution of Material Issues of Fact**

The Commission should invite the filing of petitions to deny prior to auction to minimize the incentives for losing applicants to join together in challenging the tentative winner. Supplements to petitions to deny should only be permitted by rule waiver, with the petitioner required to demonstrate that: (1) the new information could not have been obtained prior to auction; (2) the new information indicates a basic disqualifying defect; and (3) the public interest would be served by granting the waiver and exploring the petitioner's allegations. Only if the petitioner's waiver request is granted would the tentative winner be required to address the merits of the allegations



directly. As with any waiver request, the petitioner would face a "high hurdle" from the outset.

**F. Procedures When Tentative Winner Is Ineligible, Unqualified, or Unable to Pay**

The Commission has proposed rules designed to reduce the risk that the tentative winner in an auction will later be found to be unqualified, ineligible, or unable to pay the balance of its bid. However, the Commission requests comment on the procedures to be used if a tentative winner is disqualified.

UTC supports the Commission's proposal to conduct a new auction. UTC further recommends that the second round of bidding be opened to participation by new applicants as well as previous applicants. This might reduce the incentive for losing bidders to "gang up" on the tentative winner through the filing of post-auction petitions to deny, and would help ensure that the results of the first auction will not tend to skew the results of the second auction.